No. 77-1729

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN D. KELLEY and JOHN E. KELLEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WADE H. MCCREE, JR.,
Solicitor General,

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-25a) is reported at 568 F.2d 259. The district court's opinion on the government's motion to dismiss (App. C, *infra*, pp. 28a-34a) and its oral opinion at the close of trial (App. D. *infra*, pp. 35a-48a) are not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, pp. 26a-27a) was entered on January 3, 1978. On March 24, 1978, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including May 3, 1978, and on April 24, 1978, he further extended the time to and including June 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Drivers Act, 28 U.S.C. 2679(b)-(e), provides that when an injury or death is caused by a federal employee's use of a motor vehicle within the scope of his employment, the exclusive remedy is against the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2672. When any person sues the employee personally, the Attorney General shall substitute the United States as a party, defend the action, and, if the suit was filed in state court, remove the action to federal court.

The question presented is whether the filing of a timely administrative claim is a prerequisite to recovery in suits in which the United States is substituted pursuant to the Drivers Act.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act, as amended, 28 U.S.C. 1346(b), 2401(b), 2675 (a) and 2679(b)-(d), are set forth in Appendix F, *infra*, pp. 51a-53a.

STATEMENT

On November 8, 1972, respondent Helen Kelley was injured when she was struck by a car driven by Francis Hunt, a meat inspector employed by the United States Department of Agriculture ("USDA").[1] Hunt immediately notified his USDA circuit supervisor of the accident. In January 1973 a USDA investigator interviewed Mrs. Kelley and obtained a statement in which she absolved Hunt of responsibility for the accident (App. A, *infra*, pp. 3a-4a; J.A. 24-25).[2]

In May 1973 Mrs. Kelley and her husband sued Hunt in a state court, alleging that Hunt's driving was negligent. Hunt did not inform his superiors of the suit. On March 5, 1974, 16 months after the accident, respondents' counsel deposed Hunt; he testified that he was a federal employee on his way home from work at the time of the accident (App. A, *infra*, pp. 4a-5a; J.A. 83).

In December 1974, a little more than two years after the accident, the USDA General Counsel's Office learned of the pending lawsuit when contacted by Hunt's counsel, who stated that he believed his client was acting within the scope of his employment at the time of the accident and was therefore immune from suit under the Federal Drivers Act, as amended, 28 U.S.C. 2679(b)-(e), a portion of the Federal Tort Claims Act. In January 1975 the United States At-

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[1] Hunt hit Mrs. Kelley after swerving to avoid a collision with another car, driven by Ruth Semko.

[2] "J.A." refers to the joint appendix in the court of appeals.

torney for the Northern District of New York certified that Hunt was acting within the scope of his employment at the time of the accident; one week later, the case was removed to federal court under 28 U.S.C. 2679(d) (App. A, *infra*, pp. 5a-6a).

On April 7, 1975, respondents were served with a request to admit that they had never filed an administrative claim in connection with the accident. On May 1, 1975, respondents filed such a claim with the Department of Agriculture. The Department promptly denied the claim because it had not been filed within two years of the accident, as required by 28 U.S.C. 2401(b). The United States then moved to substitute itself as defendant and to dismiss the action for respondents' failure to file an administrative claim within the prescribed period.

The district court granted the motion to substitute but denied the motion to dismiss. The court ruled that, if respondents' suit had been filed more than two years after the accident (see 28 U.S.C. 2401 (b)) it would have been untimely, regardless of the fact that it was brought against Hunt personally and that New York law allows tort suits to be filed within three years. It concluded, however, that compliance with any requirement to file an administrative claim should be excused because respondents "had no indication that Hunt was a government employee acting within the scope of his employment" (App. C, *infra*, p. 31a). Referring to Hunt's statutory duty to report the lawsuit to his superiors (28 U.S.C. 2679(c); see also 28 C.F.R. 15.1) and the Attorney General's statutory duty to defend civil actions brought against federal drivers acting within the scope of their employment, the court held that "[a]ny undue delay in this process cannot operate to the benefit of the Government and to the prejudice of the plaintiffs" (App. C, *infra*, p. 32a).

The court certified its decision for interlocutory appeal under 28 U.S.C. 1292(b) (App. C, *infra*, p. 34a), but the United States elected not to appeal before trial. The case proceeded to trial, and the district court found Hunt negligent. It awarded respondents $65,000 in damages (App. D, *infra*, p. 45a).[3]

The court of appeals affirmed (App. A, *infra*, pp. 1a-25a). The court thought it clear that respondents had known Hunt to be a federal employee, if not after Mrs. Kelley's January 1973 interview with the USDA investigator, then certainly after Hunt's March 1974 deposition (*id.* at 4a-5a). Nevertheless, the court concluded that respondents' failure to file an administrative claim did not defeat their action. The court held that the administrative claim requirement applies only where a suit is brought in the first instance directly against the United States (*id.* at 12a-13a, 15a, 18a). A suit filed against the employee serves the same function as an administrative complaint, the court reasoned, because a federal driver has a duty to inform his supervisor

[3] Ruth Semko was also found negligent, and the district court apportioned liability equally (App. E, *infra*, pp. 49a-50a). Semko was uninsured and has only minimal assets.

when he is sued. Moreover, the court pointed out, the United States simply assumes the driver's liabilities when it is substituted as a defendant. Accordingly, the court determined that "[n]o identifiable public interest is served" by requiring an administrative claim in situations like that presented here (*id.* at 17a-18a).[4]

The court of appeals admitted (App. A, *infra*, pp. 21a-23a) that its decision conflicts with *Meeker* v. *United States*, 435 F.2d 1219 (C.A. 8). The court rejected the arguments—based on both statutory language and legislative history—that led the Eighth Circuit to reach the conclusion that the administrative claim requirement generally applicable under the Federal Tort Claims Act applies to those tort claims against the government that begin as actions against federal drivers. (*ibid.*).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision in this case creates a conflict among the circuits on a question that could affect hundreds of claims and suits against the United States each year. Before this decision, an administrative claim was a prerequisite for all tort suits against the United States, including suits originally

[4] Because respondents' suit was commenced within two years of the accident, the court of appeals found it unnecessary to decide "whether the two-year claim limitation of Section 2401(b) applies to the case analogically, or whether it is enough that the case was commenced against the employee within the time limited by state law" (App. A, *infra*, p. 24a).

brought against federal drivers in state court. See *Meeker* v. *United States*, 435 F.2d 1219 (C.A. 8); 1 Jayson, *Handling Federal Tort Claims* § 175.03[2], p. 6-20 (1977 and 1978 Supp.), and cases there cited. The court of appeals' ruling would permit a substantial group of tort claimants against the government to bypass the administrative claim procedure. Moreover, the decision injects an element of uncertainty into an area of the law where uniform rules are essential. By adopting a position diametrically opposed to the holding in *Meeker*, the court of appeals has created a situation in which administrative claims are prerequisites in some parts of the country but not in others. Review by this Court is necessary to resolve the conflict.

1. In fiscal year 1977, approximately 415 tort suits against the United States (approximately 25 percent of the Tort Claims Act suits filed in that fiscal year) arose from the operation of motor vehicles by federal government employees. Plaintiffs in these cases sought almost $120 million in damages.[5] Approximately 70 of the cases were commenced against individual drivers, usually in state court;[6] the remainder were initiated by administrative claims filed with the appropriate government agency. The damages sought in suits commenced against individ-

[5] These data have been compiled from internal records and court papers by the Torts Section of the Civil Division of the Department of Justice.

[6] In a few of these 70 cases the parties were of diverse citizenship, and the actions were commenced in federal court.

ual drivers averaged approximately $50,000; the damages sought in suits filed after unsuccessful attempts at administrative resolution averaged more than $300,000. These figures suggest that the administrative claim procedure efficiently disposes of the vast majority of small claims that arise from accidents involving allegedly negligent federal drivers. The United States Postal Service alone reports that in calendar year 1977 it paid 7,975 administrative claims arising from accidents involving Postal Service vehicles.

If the court of appeals' decision were allowed to stand, future claimants alleging negligence by government drivers would be able to circumvent the administrative process (at least in the Second Circuit) by the simple expedient of suing the employee. The United States then would be substituted as a defendant, and the case would proceed as if 28 U.S.C. 2401(b) and 2675 did not exist. This process likely would generate a significant increase in the number of small negligence claims adjudicated by the federal district courts, and it would also frustrate the intent of Congress that administrative procedures precede litigation.

2. The Drivers Act was enacted and incorporated into the Federal Tort Claims Act in 1961 (75 Stat. 539), before the Tort Claims Act required administrative claims as a precondition to litigation. The administrative claim requirement was added in 1966 (80 Stat. 306); at the same time, the Drivers Act was amended to refer to 28 U.S.C. 2672, the general section entitled "Administrative adjustment of

claims" (80 Stat. 307). The Drivers Act also was amended to eliminate the words "by suit" from the phrase "remedy by suit against the United States," which previously had described the nature of the action to which Congress was consenting. Congress thus modified the Drivers Act to accommodate the administrative claim requirement, and in the process indicated that the two must be taken together.

District court jurisdiction over tort suits against the United States, including Drivers Act suits, is conferred by 28 U.S.C. 1346(b). The jurisdictional grant in Section 1346(b) is "[s]ubject to the provisions of chapter 171" of Title 28. Chapter 171, 28 U.S.C. 2671-2680, includes the administrative claim requirement, Section 2675(a), which provides that "[a]n action shall not be instituted upon a claim against the United States * * * unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing * * *." The legislative history of this provision does not suggest that the phrase "instituted upon a claim against the United States" excludes Drivers Act suits initiated against individual federal employees but "deemed" actions against the United States after the Attorney General's certification that the employee was acting within the scope of his employment at the time of his allegedly tortious driving. To the extent the sparse legislative history indicates anything at all, it suggests that the administrative claim procedure should apply to all federal tort claims, including

Drivers Act claims. See H.R. Rep. No. 1532, 89th Cong., 2d Sess. 4, 6-9, 10, 15-16 (1966); S. Rep. No. 1327, 89th Cong., 2d Sess. 7-8 (1966).

Congress did not require initial resort to the appropriate agency simply in order to ensure adequate notice of a tort claim against the government; rather, Congress sought to relieve the federal courts of the burden of tort suits that could be satisfactorily resolved at the administrative level. At the same time as it imposed the administrative claim requirement, Congress also removed the $2,500 ceiling on administrative settlements that had been contained in 28 U.S.C. (1964 ed.) 2672. The legislature hoped to encourage efficient administrative disposition of claims and "to reduce unnecessary congestion in the courts." H.R. Rep. No. 1532, *supra*, at 8; S. Rep. No. 1327, *supra*, at 4. The benefits to both the agencies and the courts that can be derived from initial administrative consideration of tort claims are equally great whether those claims arise from employee operation of a motor vehicle or in some other manner, and whether the injured party sues the employee or the United States. The construction of the statute advocated here thus implements an important legislative purpose that was overlooked by the court of appeals.

3. The court of appeals acknowledged (App. A, *infra*, pp. 21a-23a) that its decision conflicts with *Meeker* v. *United States*, *supra*. In *Meeker* the plaintiff filed suit against a federal driver in state court almost two years after the accident in which she was

injured. She did not file an administrative claim. After certification and removal under the Drivers Act, the district court dismissed the case because of Meeker's failure to file an administrative claim, and the court of appeals affirmed. Adopting the approach outlined above, the Eighth Circuit concluded (435 F.2d at 1222):

> Congressional intent in enacting the requirement of exhaustion of administrative remedies, as evidenced by the legislative history of the 1966 amendment, was to improve and expedite disposition of monetary claims against the Government by establishing a system for prelitigation settlement, to enable consideration of claims by the agency having the best information concerning the incident, and to ease court congestion and avoid unnecessary litigation.

Other federal courts also have held that plaintiffs must file an administrative claim within two years of the accident, even if they sue the federal employee-driver directly.[7] *Driggers* v. *United States*, 309 F. Supp. 1377 (D. S.C.); *Smith* v. *United States*, 328 F. Supp. 1224 (W.D. Tenn.); *Hlavac* v. *United States*, 356 F. Supp. 1274 (N.D. Ill.); *Binn* v. *United*

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[7] Likewise, several courts of appeals have held that other jurisdictional defenses available to the United States under the Tort Claims Act are fully applicable in suits in which the United States is substituted for its employee under the Drivers Act. See, *e.g.*, *Carr* v. *United States*, 422 F.2d 1007 (C.A. 4); *Van Houten* v. *Ralls*, 411 F.2d 940 (C.A. 9), certiorari denied, 396 U.S. 962; *Gilliam* v. *United States*, 407 F.2d 818 (C.A. 6); *Vantrease* v. *United States*, 400 F.2d 853 (C.A. 6).

States, 389 F. Supp. 988 (E.D. Wis.); *Miller* v. *United States*, 418 F. Supp. 373 (D. Minn.); *Fuller* v. *Daniel*, 438 F. Supp. 928 (N.D. Ala.). See also *Melo* v. *United States*, 505 F. 2d 1026 (C.A. 8) (following *Meeker*); *Bialowas* v. *United States*, 443 F.2d 1047 (C.A. 3).

4. The court of appeals' decision in this case is inconsistent with the language of the statute, its legislative history, and considerations of administrative efficiency. In addition, application of the administrative claim requirement to Drivers Act suits is supported by the principle that waivers of sovereign immunity must be strictly construed. *United States* v. *Sherwood*, 312 U.S. 584, 590; *United States* v. *Testan*, 424 U.S. 392, 399. The court of appeals' decision imposes liability on the government under circumstances not clearly prescribed by Congress. It therefore runs counter to this Court's frequently repeated rule that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4.[8]

[8] Both the House and Senate Judiciary Committees have recently held hearings on proposed legislation (H.R. 9219, S. 2117, 95th Cong., 1st Sess. (1977)) that would make a claim against the United States the exclusive remedy for injuries resulting from many negligent or wrongful acts or omissions of federal employees acting within the scope of their employment. This would be accomplished by expanding the coverage of the Drivers Act to include tortious conduct in addition to that occurring during the operation of a motor vehicle. The pending bills further provide that, after the substitution of the United States as defendant in a suit originally brought against an employee, "the United States shall have available all defenses to which it would have been entitled if the action had originally been commenced against the United States under this chapter [*i.e.*, Chapter 171] and section 1346(b)." This language would establish beyond doubt that the administrative claim requirement of Section 2675(a) is fully applicable even where suit is initiated against an employee. Since the hearings in January and February 1978, the Justice Department has proposed several amendments to the proposed legislation, none of which would affect the provisions quoted above. The House held additional hearings in May 1978, and further hearings in the Senate are now scheduled for June 1978.

Passage of this legislation would diminish or eliminate the prospective importance of the question presented in this petition. It is uncertain, however, whether or when Congress will pass the pending bills, which deal in general with the difficult (and controversial) problem of the liability of the United States for the "constitutional torts" of its employees. In light of this uncertainty, the Court should grant the petition. If the legislation should thereafter be enacted, we will promptly inform the Court, and the Court may then decide whether a decision on the merits (or, perhaps, a remand to the court of appeals) would still be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
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JUNE 1978.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 7—September Term, 1976.

(Argued September 16, 1977
Decided January 3, 1978.)

Docket No. 76-6159

HELEN D. KELLEY and JOHN E. KELLEY,
Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant,

RUTH SEMKO,
Defendant.

Before:
MANSFIELD and TIMBERS, *Circuit Judges* and
DOOLING, *District Judge*,*

MORTON HOLLANDER (Rex E. Lee, Assistant Attorney General, James M. Sullivan, Jr., United States Attorney, William Kanter and Eloise

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* Of the Eastern District of New York, sitting by designation.

E. Davies, Attorneys, Department of Justice, of Counsel), *for Appellant.*

DONALD W. KRAMER (Kramer, Wales & McAvoy, of Counsel), *for Appellees.*

DOOLING, *D.J.*:

The United States is, under 28 U.S.C. § 2674, liable for tort claims in the same manner and extent as a private individual under like circumstances. No action may be instituted upon such a tort claim until it has been presented to the interested federal agency and has been finally denied (28 U.S.C. § 2675), and the claim must be presented in writing to the appropriate federal agency within two years after the claim accrues (28 U.S.C. § 2401(b)). Failure to act on the claim for six months may at the claimant's option be treated as a final denial. 28 U.S.C. § 2675.

Where the tortious injury complained of has resulted from a Government employee's operation of a motor vehicle "while acting within the scope of his . . . employment," but suit is commenced not against the Government but against the Government employee and is commenced in a state court, then 28 U.S.C. § 2679(d) provides that upon the Attorney General's certifying that the employee was acting within the scope of his employment at the time of the incident, the case must be removed to the federal district court.

> ". . . and the proceedings be deemed a tort action brought against the United States under the provisions of this title and all references thereto."

Section 2679(d) provides, as to cases removed upon the Attorney General's certificate, that

> "Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court." *

This appeal presents the question whether in such a removed tort action the plaintiffs, who originally sued a federal employee in the state court, must, nevertheless, after the removal, prove that before suing the employee they presented the claim to the Government as a claim against it in compliance with Section 2675(a) within the two years prescribed by Section 2401(b).

On November 8, 1972, plaintiff Helen Kelley was struck by a motor vehicle owned and operated by Francis A. Hunt, an employee of the Department of Agriculture. In May 1973 Mrs. Kelley and her husband sued Hunt and Ruth Semko in Broome County

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* Subsection (b) of Section 2679 provides:

> "The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim."

Supreme Court, alleging that the Semko vehicle was so negligently driven that it nearly collided with Hunt's car, and that Hunt's vehicle was driven so negligently that it went out of control and struck plaintiff. The pleading did not mention Hunt's employment. The Travelers Insurance Company, Hunt's insurer, undertook his defense and designated counsel for him. Hunt answered in July 1973; he denied the main allegations of the complaint and cross-claimed against Semko for an apportionment of any damages awarded the plaintiffs, but he did not refer to his federal employment, or plead the defense afforded by Section 2679(b) to federal drivers whose accidents occur when they are acting within the scope of their employment.

Hunt had earlier reported the accident, orally at least, to his circuit supervisor, and on January 19, 1973, a Special Agent of the Office of the Inspector General of the Department of Agriculture, David Ricks, interviewed plaintiff Helen Kelley, obtaining from her a statement of the details of the accident, a copy of a report on the surgery performed on Mrs. Kelley, and a copy of the hospital bill, which amounted to $3,773. There is no reason to suppose that Ricks did not identify himself.

Hunt did not, however, when he was sued in May 1973, deliver the process served upon him or an attested true copy to his immediate superior or to whomever his head of department had designated to receive such papers, as 29 U.S.C. § 2679(c) and 28 C.F.R. § 15.1 require, and, in consequence, none of the papers

in the lawsuit was sent to the United States Attorney, the Attorney General, or the head of Hunt's employing agency, as Section 2679(c) and Section 15.1 contemplate.

On March 5, 1974, during the taking of Hunt's deposition, his employment was put on the record explicitly, and Hunt testified that he had been working on the day of the accident in Friendsville, Pennsylvania, and was on his way home from that work when the accident happened. Still nothing was done to bring the Government into the case.

In the first days of December 1974, a little over two years after the accident, counsel for Hunt communicated with General Counsel's Office of the Department of Agriculture, and, evidently, sent copies of the pleadings to them and to the United States Attorney. Hunt's counsel took the position, in writing to the United States Attorney, that at the time of the accident Hunt was operating his own car with the permission of the federal government while acting within the scope of his employment; counsel expressed the opinion that Section 2679(b) applied to the Kelley case; he noted that Section 2679(c) requires the Attorney General to defend any civil action brought in any court against a Government employee for personal injury resulting from his operation of a motor vehicle while acting within the scope of his Government employment.

On January 29, 1975, the United States Attorney (for the Attorney General) certified, pursuant to 28 U.S.C. § 2679(d), that Hunt was an employee of the

United States and had been acting within the scope of his employment at the time of the accident. On February 6, 1975, the Government removed the case to the federal court. On May 1, 1975, plaintiffs filed a claim based on the accident with the Department of Agriculture. On May 27, 1975, the Government moved for an order substituting the United States as defendant in place of Hunt (28 U.S.C. § 2679(b), (d)), and dismissing the action because plaintiffs had failed to file an administrative claim before suing (28 U.S.C. § 2675).

Judge MacMahon (of the Southern District of New York, sitting by designation) granted the motion to substitute the United States but denied the motion to dismiss. He held inapplicable N.Y.C.P.L.R. § 214, sd.5, requiring an action for personal injuries to be commenced within three years after the cause of action accrued, since 28 U.S.C. § 2675 requires an administrative claim to be filed before commencing a tort action against the United States, and 28 U.S.C. § 2401(b) bars such an action unless the claim is presented against the United States within two years after the claim accrues and the action is commenced within six months after the mailing of a final denial of the claim. However, noting the statement in the legislative history that the bills which in 1966 amended Sections 2675 and 2401 to impose the administrative filing requirement had "the common purpose of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation

with the Government," [1] Judge MacMahon observed that plaintiffs were not at fault, had pursued their suit diligently, and had not been advised that the Government was the proper defendant, and that, on the Government side, since it was Hunt's duty to notify his superior of the suit, and the Government's duty to investigate and promptly certify Hunt's status if he was acting within the scope of his employment, delay could not rightly operate to advantage the Government and prejudice the plaintiffs. The Court concluded that the Government could not lull plaintiffs into a false sense of security by waiting until plaintiffs' time to file an administrative claim had expired and thereupon move to be substituted and to dismiss.

The case exemplifies a sub-class of Federal Tort Claims Act cases, a sub-class which draws to it no reprobation and invites no special rigor of treatment. It is, simply, one of the not uncommon cases in which a driver of a motor vehicle who is a federal employee is sued individually because the plaintiff did not know that defendant was a federal employee, or did not understand that the employee was on federal business at the time of the accident. The instances in this sub-class of cases are characterized by innocent ignorance or ingenuous blunder. There is nothing here to be discouraged or visited with disaster.

The Government argues that the United States may be sued only as it consents to be sued, that it has

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[1] From Senate Report No. 1327, 89th Cong. 2nd Sess., 2 U.S. Code Cong. and Adm. News, 1966, 2515-2516.

consented to be sued only if a claim is first presented to the appropriate department (Section 2675), is presented within two years after "such claim accrues," and is sued upon within six months after final denial (Section 2401(b)); unless, then, the action shows compliance with the statute, sovereign immunity is not waived and the court is without jurisdiction to proceed. The Government, it is pointed out, is not subject to estoppel based on acts or omissions of its agents. The Government contends finally that a number of cases directly in point have reached a result opposite to that reached by the district court in this case.

No questions of immunity or jurisdiction are genuinely involved. The Congress in setting up the tort claims procedure, now embodied in Chapter 171 of Title 28, waived the sovereign immunity of the United States except for those classes of cases listed in Section 2680. Of the Federal Tort Claims Act, enacted in 1946 (60 Stat. 842), it has been said that "It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit." *Feres* v. *United States*, 1950, 340 U.S. 135, 139. That the Act ends the immunity defense does not finish a ground for niggardly interpretation of the act.[2] It was said in *Indian Towing Co.* v. *United States*, 1955, 350 U.S. 61, 68-69:

> "The broad and just purpose which the statute was designed to effect was to compensate the

[2] See *Aetna Casualty & Surety Co.* v. *United States*, 2d Cir. 1948, 170 F.2d 469, 471.

> victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Govenment to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it."

The case is, by the very fact of the United States Attorney's certificate, identified as one of the classes of tort cases in which the United States has waived immunity, and Section 1346(b), with Section 2679 (b), (d), explicitly confers jurisdiction on the district courts in such federal tort cases.

Before the 1966 amendment of Sections 2401(b), 2672, 2675 and 2679(b), presently to be discussed, the filing of an administrative claim was not a prerequisite to commencing or maintaining a Federal Tort Claims Act action against the United States in the federal court, especially when the demand exceeded $2,500. See *Schlingman* v. *United States*, S.D.Cal. 1963, 229 F.Supp. 454, 455. Under the earlier law Section 2672 empowered the heads of federal agencies to consider and settle only claims for $2,500 or less. While suit could not be commenced until a claim filed under Section 2672 was finally denied, the claimant could withdraw the claim from consideration on fifteen days notice and commence

suit. Until the 1966 amendments Section 2401(b) required tort actions against the United States to be commenced within two years after the claim accrued.

After the "Federal Drivers Act" was passed in 1961, adding subsection (b) through (e) to Section 2679, it was held that, where a plaintiff sued a federal driver in the state court within two years after the accident, the suit was timely as a suit against the United States even though the United States did not appear, certify that the driver had been acting within the scope of his employment and remove the suit until more than two years after the accident. *Whistler* v. *United States*, N.D.Ind. 1966, 252 F.Supp. 913. The court said, referring to state court suits against federal drivers (at 915):

> "While the statute has rendered futile such attempts to sue individual employees and to litigate federal tort claims in the state courts, it has not in some mystical way abolished the bringing of such actions, although this seems to be the Government's position. If this were the effect of § 2679(b), subsection (c) would be meaningless in some of its aspects, and subsection (d) would be wholly meaningless. . . . If the bringing of such an action were ineffective for all purposes, then that action could not be removed as provided in subsection (d) or defended by the Attorney General as provided in subsection (c). . . . From a practical standpoint and from a realistic interpretation of the intention of Congress in its enactment of § 2679(b)-(d), the original suit must also be effective for purposes of determining

> whether it was brought within the period of limitations provided by 28 U.S.C. § 2401(b)."

The court pointed out that the plaintiff could not either be certain that his action was one appropriate for Federal Tort Claims Act prosecution or exercise control over the time of the removal of the case to the federal court.

Henderson v. *United States*, 10th Cir. 1970, 429 F.2d 588, similarly held that where a state court suit against a federal driver was commenced within two years after the accident and the United States Attorney certified the case and removed it to the federal court more than two years after the accident, the action was timely as an action against the United States. Said the court (429 F.2d at 590):

> "The federal court having found that Price [the driver] was acting within the scope of her employment at the time of the accident, the only cause of action that existed was against the United States. In this situation the United States became a party as a matter of law when the action was filed in the state court, regardless of when it was formally substituted as a party defendant."

See also *Miller* v. *United States*, D.Minn. 1976, 418 F.Supp. 373, 377n2, 378; *Reynaud* v. *United States*, W.D.Mo. 1966, 259 F.Supp. 945, 946; *Jones* v. *Polishuk*, E.D.Tenn. 1966, 252 F.Supp. 752, 754 (the Government a party to suit against employee as a matter of law if employee acting within scope of employment).

There is no ground for concluding that the 1966 amendments altered the method of handling suits commenced in state courts against federal drivers. The 1966 legislation was as broad as the Federal Tort Claims Act. It was enacted to relieve the courts of the great volume of tort cases, and to make it possible to settle claims in excess of $2,500 without the necessity for filing suit against the United States. 1966 U.S. Code Cong. & Adm. News 2516-17. The 1966 changes removed the $2,500 limitation altogether, and added a requirement that the Attorney General approve awards or settlements exceeding $25,000. Section 2675 was amended to provide that "An action shall not be instituted upon a claim against the United States for money damages . . . unless the claimant shall have first presented the claim to the appropriate Federal agency. . . ." Having provided for the filing of administrative claims as a condition precedent to instituting suit against the United States, it was necessary to adjust the statute of limitations provision. Section 2401(b) was accordingly amended to make the two years limitation apply to the filing of the administrative claim rather than to instituting suit.

There was no explicit reference in the 1966 legislative history to the suits commenced in the state court and removed to the federal court on the Attorney General's certificates.[3] Section 2675(a) re-

[3] Before the 1961 enactment of the Federal Drivers Act the United States Attorneys on a number of occasions sought to remove state court cases against federal drivers to the federal

quires an administrative filing before an action is "*instituted* upon a claim against the United States." It does not in terms apply to an action already instituted and removed and which is, upon removal, "deemed a tort action brought against the United States." The language of Section 2679(b)-(e) is alive with the implication that the action against the employee will be the action that the Attorney General must defend and that is deemed a suit against the United States. The statute plainly does not mandate dismissal of the action against the employee upon the Attorney General's presenting the statutory certificate but rather mandates defense of the action. The statute does not require that prompt certification and removal of the state court case which would alert the plaintiff to the need for filing an administrative claim, but permits removal at any time before trial. The employee, however, is required to deliver all process to the Attorney General within such time as the Attorney General determines (Section 2679(c)), and the Attorney General's regulations (28 C.F.R. § 15.1) not only require the employee to deliver all process and pleadings served upon him to his immediate superior, or to whomever his department head designates, "forthwith," but also requires

court under 28 U.S.C. § 1442(a)(1) as suits against persons acting under federal officers based on acts "under color of office." The majority rule was that removal was not authorized because driving a motor vehicle was not sufficiently identified with the government employee's official functions. *Goldfarb* v. *Muller*, D.N.J. 1959, 181 F.Supp. 41; *Naas* v. *Mitchell*, D.Md. 1964, 233 F.Supp. 414.

that upon receipt of process or pleadings or any prior information regarding the commencement of suit, the employee must immediately advise his superior or the designee by telephone or telegraph; the superior or designee must furnish information and copies of process and pleadings "promptly upon receipt thereof" to the United States Attorney and the Torts Section, Department of Justice, Civil Division. The statute itself requires the employee to furnish copies of process and pleadings promptly not only to the United States Attorney and the Attorney General but also to "the head of his employing agency."[4]

The statute can not be thought to contemplate that the defense of the case by the United States will consist in moving to dismiss it because no administrative claim against the United States was filed. That will typically have been the case; few, if any, plaintiffs will have sued the federal driver knowing that the suit might properly have been commenced against

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[4] It was said in *Brennan* v. *Fatata*, Oneida Co. 1974, 78 Misc. 2d at 967, 359 N.Y.S. 2d at 92:

> "If the defendants are to obtain the benefits of the Federal preemption of section 2679 of Title 28 of the United States Code, they must follow its provisions by turning their suit papers over to the United States Attorney General (U.S. Code, tit. 28, § 2679, subd. [c]) who will then certify if the defendants were within the scope of Federal employment and the action will be removed to Federal court (U.S. Code, tit. 28, § 2679, subd. [d]). It is implicit in the statute that if the defendants do not turn over their suit papers or if the Attorney General does not certify to their being in the scope of Federal employment, the State action continues against the defendants personally."

the United States. The words of the staute—"The Attorney General shall defend any civil action", the "proceedings deemed a tort action against the United States"—too plainly contemplate the continued defense of the action on the merits.

The 1966 amendments clearly impose a condition precedent to instituting suit directly against the United States, and the "administrative" claim usually —although not always—sets a ceiling on the amount that may be sued for and recovered. But the "administrative" stage does not create a record that measures rights or becomes the record for judicial review. The claim need not be presented until two years after the event, and, when filed, stays suit for only six months. Section 2675(a) itself, by its last sentence, provides that it shall not apply to "such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim or counterclaim." While the exception may well be limited to claims arising out of the same transaction or occurrence that is the subject matter of the principal action (*cf. United States* v. *Chatham*, N.D. Ga. 1976, 415 F.Supp. 1214), and it has been read with almost perverse narrowness (*Rosario* v. *American Export-Isbrandtsen Lines, Inc.*, 3rd Cir. 1976, 531 F.2d 1227; *Bernard* v. *U.S. Lines, Inc.*, 4th Cir. 1973, 475 F.2d 1134, 1136), the exception nonetheless demonstrates that in one common situation the 1966 legislation visualized that no administrative claim need be filed as a condition precedent to obtaining full judicial relief. The exception recognizes a duty

to defend in a pending case not different in kind from the duty to defend imposed by Section 2679(c) and (d). And, as noted, Section 2679(c) and 28 C.F.R. § 15.1 make careful provision for securing prompt and complete notice to the Government of any pending suit involving potential federal liability.

That the lawsuit against the employee is, without more, the intended vehicle through which the rights of plaintiff, employee and Government are to be adjudicated appears too from Section 2679(e). Subsection (e) provides that

> "The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect."

The phrase "such civil action or proceeding" reiterates the phrase used in the first and second sentences of subsection (c) and in the first sentence of subsection (d) of Section 2679. That phrase, when used in subsections (c) and (d), means only the suit commenced against the employee in whatever court it was commenced, provided always that the employee is certified to have been acting within the scope of his employment and no contrary pretrial finding is made. Section 2677 originally authorized the Attorney General "with the approval of the court" to settle "any claim cognizable under Section 1346(b) of this title", but he could do so only "after the commencement of an action thereon." See 28 U.S.C. § 2677 (1964). The 1966 amendments altered Section 2677 in two respects: it deleted the requirement for court approval of settlements, and empowered the Attorney General "or his designee" to make settlements. No change was made in subsection (e) of Section 2679. The implication is that, although the suit against the employee is not literally within Section 2677 because it is not formally an action against the United States, it may be settled in the same manner as if it were.

The legislative history is clear. The Senate Report (No. 736, 87th Cong., 1st Sess.) on the bill that became Section 2679(b)-(e) quoted the following with approval from the House Report on an earlier bill containing the language which became Section 2679 (e) (2 U.S. Code Cong. and Adm. News, 1961, 2788):

> "Subsection (e) grants the Attorney General the authority to settle cases in the same manner as he now does under section 2677 of title 28. The committee feels that this is a particularly important provision, for there may be cases in which the Attorney General will find it is to the advantage of the United States to settle the matter at the earlier stages of the proceeding. In those instances where the proceeding is commenced in a State court this settlement can be effected before removal to a U.S. district court. This makes possible the elimination of unnecessary delay and difficulty to everyone concerned, for if the case is a proper one for settlement it is only logical to provide authority for settlement without requiring removal to the Federal court."

No identifiable public interest is served by rejecting a plain and straightforward reading of Section 2679

(b)-(e) in favor of insistence that a requirement of administrative filing be injected into it. No matter what the date of filing of the suit, such a reading would require an immediate dismissal of all actions against employees except in the rarest of rare cases, the case in which an administrative claim had been filed and the action against the employee was a precautionary filing made to cover the chance that the employee was acting outside the scope of his authority. The Government is not the wiser or better informed for receiving an administrative claim rather than a complaint; it loses no right or power to deal with the claim; in fact the form of the case must focus attention on a point which it might not otherwise have considered contesting; and the suit may alert it to the existence of rights under such insurance as the federal driver may have (*United States* v. *Government Employees Inc. Co.*, E.D. Va. 1976, 409 F. Supp. 986).

To interpret Section 2679(b)-(d) as incorporating the administrative filing requirement of Section 2675 (a) runs counter to the dominating purposes of the Federal Tort Claims Act and of Section 2679(b)-(d). The central purpose of the Federal Tort Claims Act was to end the old injustice of the tort immunity, and the purpose of Section 2679(b) was to protect the federal drivers from individual liability and from the necessity of carrying liability insurance. In exactly the most excusable and understandable case—the case of the plaintiff who sues in ignorance of the fact that the defendant was a federal driver operating within

the scope of his employment—requiring an administrative filing produces the most unjust refinement of interpretation: the plaintiff must have filed a claim that he did not know he had; his suit must be dismissed unless plaintiff can prove that the Government was wrong in certifying that the federal employee was acting within the scope of his employment.[5] The interpretation puts a premium on plaintiff's establishing what it is the purpose of Section 2679(b)-(d) to prevent, that the employee is liable.

Nothing in either enactment authorizes the view that in this context the Congress was jealous to preserve a shabby remnant of sovereign immunity, or designed to confront litigants with a half-concealed

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[5] The certification procedure contains its own complexities. The government employee cannot mandamus the Attorney General to issue a certificate. *Saiden* v. *United States*, 6th Cir. 1976, 537 F.2d 867; *Lemley* v. *Mitchell*, D.D.C. 1969, 304 F.Supp. 1271. The Attorney General's decision has been held to be reviewable under Administrative Procedure Act standards (5 U.S.C. § 706(a)(A)) on the administrative record. *Proietti* v. *Levi*, 9th Cir. 1976, 530 F.2d 836. Given the statutory purpose reflected in the language of Section 2679(b), the remand sentence in Section 2679(d) has been held to authorize remand only when the court has found that the employee was not acting within the scope of his employment. *Thomason* v. *Sanchez*, 3rd Cir. 1976, 539 F.2d 955, 957-958; *Carr* v. *United States*, 4th Cir. 1970, 422 F.2d 1007, 1010; *van Houten* v. *Ralls*, 9th Cir. 1969, 411 F.2d 940; *Noga* v. *United States*, 9th Cir. 1969, 411 F.2d 943; *Vantrease* v. *United States*, 6th Cir. 1968, 400 F.2d 853, 855; *cf. Perez* v. *United States*, S.D.N.Y. 1963, 218 F.Supp. 571, 576; *McCrary* v. *United States*, E.D.Tenn. 1964, 235 F.Supp. 33. On that isolated issue trial and appellate court can differ. *Levin* v. *Taylor*, D.C.Cir. 1972, 464 F.2d 770.

hurdle to a judicial hearing against the real party in interest on the merits of their claims.

The cases relied on by the United States as being directly relevant did not arise on similar facts. In *Baker* v. *United States*, D.Md. 1972, 341 F.Supp. 494, aff'd 4th Cir. 1972 in unpublished memorandum, the state court suit was commenced against the employee more than two but less than three years after the accident and it was barred by former Section 2401 (b) but not by the state statute of limitations. *Kangas* v. *United States*, D.Minn. 1975, unreported, 2-75 Civ. 34, involved a state court suit commenced against the employee "on or about" the second anniversary of the accident. In *Elter* v. *United States*, W.D.Pa. 1974, unreported, Civil No. 74-526, the state court action against the employee was started nearly four years after the accident. In *Grix* v. *United States*, E.D.Mich. 1975, unreported, Civil No. 74-72550, the suit was against the United States in the first instance, apparently; no claim was filed under Section 2675. In *Baker* neither the plaintiffs nor the government employee understood that the employee was considered in law to be acting in the scope of his employment at the time in question. Said the court, "The result in the instant case seems unfair . . . " (340 F. Supp. at 496). In *Kangas* the plaintiff was allegedly misled by the mistaken legal advice given to him by a postal inspector. In *Elter* the court held irrelevant the plaintiff's alleged ignorance that the defendant was a government employee acting within the scope of her

employment. In *Grix* the court held that plaintiff's ignorance that the operator of the other motor vehicle in the accident was a Government employee did not excuse delay or omission to file an administrative claim.

These and other cases, conspicuously, *Meeker* v. *United States*, 8th Cir. 1970, 435 F.2d 1219, simply reject the contention that suits commenced as suits against Government employees are not within Section 2675's requirement that a claim first be filed with the interested federal agency. See, *e.g.*, *Driggers* v. *United States*, D.S.C. 1970, 309 F. Supp. 1377, 1379; *Smith* v. *United States*, W.D.Tenn. 1971, 328 F.Supp. 1224. The argument has been that Section 2679 (b) through (e) invoke all of the provisions of the Federal Tort Claims Act, and, particularly in light of the 1966 amendments to Section 2675 and 2679 (b), must be taken to incorporate the requirement that the administrative filing precede suit. But the argument is supported neither by the language nor the purpose of the 1961 amendments to Section 2679, nor by the language or purpose of the 1966 amendments. The interpretation adopted serves no articulable policy interest of the Government and creates a continuing hazard of random injustices in cases of evident right.

It has been stated that the inclusion in Section 2679(b) of a reference to Section 2672, and the 1966 deletion from the phrase "remedy by suit" in Section 2679(b) of the words "by suit" signified that, even in the case where the individual employee is sued,

plaintiff must first file an administrative claim (*Driggers* v. *United States, supra*, 309 F.Supp. at 1379), and the statement is indicated to be supported by the Senate Report on the bill that became law. But the language cited simply states the language changes being made without particular reference to cases commenced against employees individually (2 U.S. Code Cong. and Adm. News, 1966, 2521-2522). The inclusion of a reference to Section 2672 in Section 2679(b) simply expresses the intention that the claimant has no remedy against the driver if the driver was acting within the scope of his employment, whether the claimant proceeds by suit or settlement. But *Meeker* v. *United States, supra*, 435 F.2d at 1222, cited *Driggers* with approval and added that, independently of the reason for the result given in *Driggers*, Section 2679 by its own terms requires the same result. The court reasoned that subdivision (d) of Section 2679 effectuated the exclusive remedy purpose of subdivision (b) of the section by providing that upon the certification and removal of the suit against the employee to the federal court, the proceedings shall be "deemed a tort action brought against the United States under the provisions of this title and all references thereto." Again, the language relied on does not support the conclusion. It is far truer to the language to read it as implying that the removed case is to continue to judgment on the merits as a tort case against the United States subject to only one condition: that it is not found on pretrial motion that the employee was acting be-

yond the scope of his employment (*Carr* v. *United States*, 4th Cir. 1970, 422 F.2d 1007, 1010), in which event the case is remanded. Cases have held, too, that the commencement of an action against the employee cannot be treated as the equivalent of filing a claim against the United States. See *Best Bearings Co.* v. *United States*, 7th Cir. 1972, 463 F.2d 1177, 1179; *Meeker* v. *United States, supra*, 435 F.2d at 1221; *Smith* v. *United States, supra*, 328 F.Supp. at 1226. But even if that were requisite in a case started against the federal employee in the state court, no persuasive reason for not considering the service of the complaint to be an adequate claim-making appears: Section 2679(e) and 28 C.F.R. § 15.1 assure the prompt presentation of the process and pleadings to appropriate officers of the Government, and if there is, as here, an occasional failure of transmission, it is not apparent that the consequence should be visted on the plaintiff. In this case plaintiffs sued well within the two years allowed for presenting claims, and the Government should have had prompt and complete notice of the claim. The prompt investigation by Ricks indicates that Hunt's early report at least alerted the Government.

But the significant factors are that plaintiffs commenced their action in good season and that the Government issued the scope-of-employment certificate and removed the case. The union of those acts validated the action as one the further proceedings in which were deemed a tort action brought against the United States. It is not necessary to decide in this

case whether the two-year claim limitation of Section 2401(b) applies to the case analogically, or whether it is enough that the case was commenced against the employee within the time limited by state law. It was timely on either basis, and the United States was free to certify and remove at any time before trial. Nor is it necessary to determine whether, for purposes of deciding when the claim against the United States accrued, plaintiffs would be entitled to claim a "discovery" date of March 1964, less than two years before they filed an administrative claim, or, indeed, a discovery date when they learned of the certification.

The Government points out that the judgment rendered against it (and its co-defendant) directed each to pay the damages awarded with interest at the rate of 6% per annum from July 22, 1976, the date on which the judgment was entered. Final judgments against the United States in actions instituted under Section 1346 (which includes Federal Tort Claims Act cases) bear interest, under 28 U.S.C. § 2411(b), at the rate of 4% per annum from the date of judgment until a date not later than thirty days after the approval of any appropriation Act providing for the payment of the judgment. A continuing appropriation, 31 U.S.C. § 724a, provides for the payment of judgments of the class here involved, and a proviso in that section states that when a judgment to which Section 2411(b) applies is payable from the continuing appropriation, "interest shall be paid thereon only when such judgment becomes final after review on

approval . . . by the United States, and then only from the date of the filing of the transcript thereof in the General Accounting Office to the date of the mandate of affirmance." See *United States* v. *Jacobs*, 5th Cir. 1962, 308 F.2d 906; *United States* v. *State of Maryland*, D.C.Cir. 1965, 349 F.2d 693, 694-695; *United States* v. *Varner*, 5th Cir. 1968, 400 F.2d 369, 372. The judgment must be modified to conform to Section 724a so far as the judgment affects the United States.

Modified to provide that the judgment against the United States bears interest at 4% per annum from the date of filing of the Transcript thereof in the General Accounting Office to the date of the mandate of affirmance and as so modified, affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-6159

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the third day of January one thousand nine hundred and seventy-eight.

Present:

HON. WALTER R. MANSFIELD
HON. WILLIAM H. TIMBERS
Circuit Judges
HON. JOHN F. DOOLING
District Judge

HELEN D. KELLEY AND JOHN E. KELLEY,
PLAINTIFFS-APPELLEES

v.

UNITED STATES OF AMERICA AND RUTH SEMKO,
DEFENDANTS

UNITED STATES OF AMERICA, DEFENDANT-APPELLANT

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the

Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed, as modified, in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

By /s/ Arthur Heller
Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 75-CV-62

HELEN D. KELLEY AND JOHN E. KELLEY, PLAINTIFFS

v.

FRANCIS A. HUNT AND RUTH SEMKO, DEFENDANTS

MEMORANDUM

*MacMAHON, District Judge**

The United States of America moves to be substituted as defendant in place of defendant Hunt pursuant to 28 U.S.C. § 2679(b), and to dismiss the claim against the United States for plaintiffs' failure to file administrative claims prior to bringing suit as provided in 28 U.S.C. § 2675(a).

Plaintiff, Helen Kelley, was allegedly injured, while walking along the side of a road in Binghamton, New York, due to the negligence of defendants Hunt and Semko in the operation of their automobiles on November 8, 1972. Defendant Hunt was an employee of the United States at the time of the accident, but plaintiffs were unaware of that fact: for Hunt was driving his own automobile which bore no indication of his government employment. Plain-

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* Of the United States District Court for the Southern District of New York, sitting by designation.

tiffs commenced an action against Hunt and Semko in May, 1973 in New York Supreme Court, Broome County, seeking damages for personal injuries, medical expenses, and loss of services. Twenty months later, some two years and three months from the time of the accident, the United States certified that Hunt had been acting within the scope of his employment when the accident occurred, and removed the case to the District Court on February 5, 1975 pursuant to 28 U.S.C. § 2679(d). Shortly thereafter, plaintiffs filed administrative claims with the appropriate federal agencies, which were denied as time barred because they had not been presented within two years from the time when the claims accrued. 28 U.S.C. § 2401(b).

The motion to substitute must be granted. It is clear from the applicable statutes, 28 U.S.C. §§ 1346 (b) and 2679(b), that plaintiffs' sole and exclusive remedy is against the United States and not against the individual employee. *Garrett* v. *Jeffcoat*, 483 F.2d 590 (4th Cir., 1973); *Perez* v. *United States*, 218 F. Supp. 571 (S.D.N.Y. 1963).

Plaintiffs contend that the motion to dismiss should be denied in the interest of judicial economy. They assert that the general statute of limitations of two years for suits against the Government, contained in 28 U.S.C. § 2401, does not apply where an action was commenced against the individual employee in state courts since 28 U.S.C. § 1346(2)(b) states that the United States, under the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680), is liable "in

the same manner and to the same extent as a private individual under like circumstances." Since Hunt, as a private individual, would be liable under a three year statute of limitations in New York (Civil Practice Law and Rules § 214), it is asserted that plaintiffs did not have to file administrative claims within two years of the accident. They claim that even if this suit is dismissed, they could bring another action against the United States until November 8, 1975, or three years from the accident, since they have now filed administrative claims. Therefore, to avoid a needless duplication of effort, plaintiffs ask that we deny this motion to dismiss their claim against the Government.

The United States contends that a dismissal is mandated because plaintiffs did not file the requisite administrative claims prior to the bringing of their suit under 28 U.S.C. § 2675(a).

Plaintiffs' assertion that the New York three year statute of limitations applies to this case is incorrect. Section 1346(2)(b) of Title 28, United States Code, on which plaintiffs rely, is expressly subject to the provisions of the Tort Claims Act. And § 2675 of the Act, which requires the filing of administrative claims, was amended in the same bill which amended § 2401 (Pub. L. 89-506, 80 Stat. 306) to limit the time for submitting claims to two years from accrual. The legislative history of this bill indicates that § 2401 was amended to conform with the requirements of the Tort Claims Act. Therefore, the New

York three year statute of limitations has no application to plaintiffs' claim against the Government.

However, we are not convinced that the United States is entitled to a dismissal. It is clear, from the legislative history, that the Federal Tort Claims Act has the purpose "of providing for more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government, S. Rept. No. 1327, 89th Cong. 2d Sess., 1966 U.S. Code Cong. & Admin. News p. 2515. In light of this enlightened policy, a dismissal would result in an injustice. Plaintiffs would be forever barred from asserting this claim for relief because they failed to file administrative claims within two years of the accident. However, this failure was not the fault of the plaintiffs, as they had no indication that Hunt was a government employee acting within the scope of his employment, but the fault of Hunt or his superiors for failing to follow the prescriptions of 28 U.S.C. § 2679(c).

It appears that plaintiffs have at all times diligently prosecuted this suit. There was no delay in the bringing of the action in state court against the only persons who, to the best of plaintiffs' knowledge, might bear legal responsibility. Plaintiffs were not informed during the twenty months this suit was pending in the New York court that the United States, and not Hunt, was the proper party defendant. Hunt was under a statutory duty to report this suit to his superiors (28 U.S.C. § 2679(c)), and the Gov-

ernment was under a duty to investigate the matter and promptly certify that Hunt was acting within the scope of his employment. Any undue delay in this process cannot operate to the benefit of the Government and to the prejudice of the plaintiffs. Surely the Government by its own inexcusable delay, if not sharp practice, should not be permitted to lull the plaintiff into a false sense of security by waiting for the time to expire for the filing of an administrative claim before moving to be substituted as a defendant in the state action, removing it to a federal court and then moving to dismiss.

The cases cited by the United States in support of this motion are inapplicable for in those cases, there was either delay in certification which still left sufficient time for the filing of administrative claims (See, e.g., *Hoch* v. *Carter*, 242 F. Supp. 863 (S.D.N.Y., 1965); *Driggers* v. *United States*, 309 F. Supp. 1377 (D.So.Car., 1970); *Gustafson* v. *Peck*, 216 F. Supp. 370 (N.D.Iowa, 1963)), or the suit was deliberately brought against the individual employee to avoid the running of the statute of limitations or the need to file administrative claims (See, e.g., *Meeker* v. *United States*, 435 F.2d 1219 (8th Cir., 1970); *Peterson* v. *United States*, 428 F.2d 368 (8th Cir., 1970)). Two other cited cases (*Bialowas* v. *United States*, 443 F.2d 1047 (3d Cir., 1971), and *Avril* v. *United States*, 461 F.2d 1090 (9th Cir., 1972)) deal with a situation where plaintiffs were aware that their claims were against the Government, but filed incomplete administrative claim forms prior

to bringing suit. The Government fails to cite, and we have failed to find in our own research, a single case holding that a plaintiff, who acted in good faith in bringing suit against a government employee, might lose his remedy due to a protracted, and perhaps a calculated, delay by the United States in fulfilling its obligations under the Tort Claims Act.

While it is true that the United States is immune from suit except to the extent that it has waived immunity, and that it may impose conditions for bringing actions against it, we do not believe that the Government may manipulate the conditions to deny plaintiffs their day in Court to seek redress for their injuries.

The procedure set out in the Tort Claims Act is "to provide a method for the assumption by the Federal Government of responsibility for claims for damages against its employees arising from the operation by them of vehicles in the scope of their Government employment." S. Rept. No. 736, 87th Cong. 1st Sess., 1961 U.S. Code Cong. and Admin. News p. 2785. A dismissal here would result in a method for the avoidance of the very responsibility which the United States has consented to assume.

Accordingly, the motion to substitute is granted and the United States shall come into this action in defendant Hunt's place and stead.

The motion to dismiss the claim is denied.

Certification for Immediate Appeal

We believe that the above decision and order presents a controlling question of law as to whether on the undisputed facts this action is time barred by plaintiff's failure to file an administrative claim within two years of the accident. There is substantial ground for difference of opinion and an immediate appeal from our decision and order may materially advance the ultimate termination of this litigation. Accordingly we hereby certify the case for immediate appeal under 28 U.S.C. § 1292(b) and hereby stay all further proceedings in this action pending determination of an appeal or denial of permission to appeal from our order by the Court of Appeals.

So ordered.

Dated: Syracuse, N.Y.
September 18, 1975.

/s/ Lloyd F. MacMahon
LLOYD F. MACMAHON
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

75-CV-62

HELEN D. KELLEY AND JOHN E. KELLEY, PLAINTIFFS

-against-

THE UNITED STATES OF AMERICA AND RUTH SEMKO, DEFENDANTS.

DECISION OF HON. EDMUND PORT, in the above-entitled matter given on the 4th day of June 1976 at the Federal Building, Auburn, New York.

APPEARANCES:

KRAMER, WALES & McAVOY, ESQS.
Attorneys for the plaintiffs,
BY: DONALD KRAMER and BRIAN WRIGHT, ESQS.,
of counsel.

HINMAN, HOWARD & KATTELL, ESQS.
Attorneys for defendant, U.S.A.
BY: THEODORE SOMMER, ESQ.,
of counsel.

HON. JAMES M. SULLIVAN, JR.,
United States Attorney, for Defendant U.S.A.
BY: JOSEPH MATTHEWS, Assistant United States Attorney.

ROBERT C. POWERS, ESQ.
Attorney for Defendant, Semko.

THE COURT: Gentlemen, as I indicated to you at the close of the evidence, I wanted to have an opportunity to examine the exhibits and to review my notes. There were practically no legal problems in connection with the case. It was a garden variety automobile pedestrian negligence action. The only legal problem that I can see in the case is the one that was disposed of by Judge MacMahon. Having reviewed the matter, I am prepared now to and will dictate my findings of fact and conclusions on the record.

This is an action for damages brough by Helen Kelley and John Kelly. It is Helen D. Kelley and John E. Kelley against the United States and Ruth Semko for damages and injuries sustained by Helen Kelley as a result of an accident occurring on November 8, 1972 at about 2:40 p.m. on Upper Park Avenue in the Town of Binghamton in Broome County, New York, in the vicinity of the Vosburgh residence. The particular time was described as being about dusk. The plaintiffs are husband and wife. The defendant is the United States of America, and Ruth Semko is the owner and operator of one of the automobiles involved in this particular incident.

Helen Kelley was 59 years plus at the time of the accident, married and living with her husband, John E. Kelley, for many years, having raised a family of three children to adulthood.

The United States of America is named as a defendant as a result of the operator of a second vehicle involved in the vicinity, one Francis Hunt who

was an employee of the United States Department of Agriculture at the time of the accident, and by admission of the defendant, the United States, was acting within the scope of his employment at the time.

The suit was initially instituted against the Defendant Semko and Francis Hunt in Broome County. It was removed from Broome County on the certification of the United States pursuant to the provisions of the Federal Tort Claims Statute. A motion was made to substitute the United States after the removal of the action to this court in place of the Defendant Hunt. That motion was granted by Judge MacMahon. At the same time a motion was made to dismiss the action against the United States on the ground that the plaintiff has failed to timely file an administrative claim. Judge MacMahon, in a written, well-rounded opinion, granted, of course, the motion to substitute the United States in place of Hunt as a defendant, and denied the motion to dismiss.

Upper Park Avenue at all the times that we are concerned with was a road running generally in a northerly and southerly direction in the Town of Binghamton, between the City of Binghamton and Hollyton. The Vosburgh residence is situated on Upper Park Avenue at a point where Upper Park Avenue ascends and forms a crest of a grade in front of the Vosburgh premises. The road approaching the Vosburgh residence from the north is substantially level and straight. About opposite the Vosburgh driveway and proceeding to the south, the road takes a decline, the degree of which was not brought out on

the trial. The pictures make it difficult to determine the degree because of prospectives.

As one approaches the road opposite the Vosburgh residence and the crest of the hill, the line of sight is limited, but it is possible to see a vehicle approaching the crest in either direction for a short distance prior to reaching the crest. Upper Park Avenue is a macadam two-lane highway approximately 16 feet wide at the time of the accident without markings of any kind. There was neither a center line or demarcation lines for the edge of the road. A few feet from the north of the north edge of the Vosburgh driveway leading out to Upper Park Avenue, there was a mailbox. At the time I mentioned, Francis Hunt, the government employee, was driving his car in a northerly direction. The Defendant Semko was driving her car in a southerly direction. As a result of the negligence of each defendant, each one on approaching the other, was partially to the left of the center line of the highway. Approaching each other in that position, they each attempted to take some diversionary action. Mrs. Semko drove her car to her right off onto the shoulder of the road and then back onto the road. Mr. Hunt veered his car to the right. As a result of the action, his car—incidentally, it was raining at the time, the road was wet. His car went into a skid, fishtailing as it proceeded north past the crest of the hill, and in the course of the skidding of his car, it, at one point, reached a position at right angles to the road. The front part of his car being on the paved portion of the road and the rear portion on the

shoulder of the road ultimately. His car crossed over to the other side of the road as a result of a counterclockwise motion of his car, so that it wound up on the west side of the road facing in a southerly direction, having negotiated a 180-degree turn. In the course of this skid, the plaintiff was struck by some part of the rear of the Hunt car. The plaintiff's only recollection of the accident was a recollection of seeing the grille of a car, which I found to be that of Hunt, approaching her. She attempted to move to her left but was obstructed by a bank in the road and was struck by the car before she could manage to get out of its path.

Prior to the accident, the plaintiff had been taking a walk and was at a point approximately 130 feet north of the mailbox that I have referred to on the shoulder of the road, and on the easterly side of the road walking south. So that she was walking in accordance with the mandate of the Vehicle and Traffic Law of the State of New York, on the shoulder, facing oncoming traffic.

Each defendant was negligent in the operation of their respective vehicles under all the facts and circumstances existing at the time. And the negligence of the defendants was the proximate cause of the plaintiff's injuries. That is, their combined negligence, or the negligence of each of them was a substantial factor in bringing about the injuries to the plaintiff. The accident and injuries to the plaintiff resulting therefrom were caused solely by the negligence of the defendants and was not caused or con-

tributed to in any way by any negligence on the part of the plaintiff, Helen Kelley.

In weighing the negligence contributing to the accident of each defendant vis-a-vis the other, I find that they contributed equally, or their negligence contributed equally to the accident and to the plaintiff's injuries.

As I indicated earlier, the plaintiff, Helen Kelley, is a very nice looking, slim woman at the present time who, at the time of the accident, was upwards of 59 years of age with a stipulated life expectancy of 13.79 years. Mr. and Mrs. Kelley's family consisted of three children, all of whom at the time of the accident were grown and away from the family home. With her release from the obligations of raising a family, Mrs. Kelley enlarged her activities beyond those that she had prior to the accident of attending to her family and her household, and in addition to cleaning and taking care of her house and cooking and generally operating the household, and engaging in the usual normal social other activities of husband and wife, she now undertook rather extensive athletic activities for a woman of her age. She became a tennis player, joined a tennis club, played tennis frequently, engaged in club and league tournaments. She swam. She and her husband rollerskated together, and she made it a practice to take long walks daily, or nearly daily.

After the accident, by reason of the injuries she sustained, these athletic activities, per force were limited. Her tennis was resumed after a period of

recovery, convalescence and rehabilitation on a limited scale and with a more moderate and less competitive sort of play. She no longer engaged in tournament or competitive activity. She did practically no swimming, although swimming was one of her activities prior to the accident. She resumed gardening on a limited basis, and because of the difficulty in kneeling, and she found that even in church going, it was necessary that she have an extra pillow for kneeling purposes. She suffered, still suffers pain on sitting or standing still for any considerable period of time as a result of the stiffening of the knee and the joints. Her walks, although she still engages in them, are now limited to her driveway and are no longer the type of walk over the country roads and up and down the hills that she did before the accident. She has difficulty in walking up and down stairs.

As a result of the accident, the plaintiff suffered extensive injuries to both legs. She suffered an open comminuted fracture of her right femur. The thighbone was fractured severely with the bone fragmented and some bone penetrating through the skin. She sustained a serious injury to her left knee. Several ligaments were ruptured, and the kneecaps were ruptured. The fibula was broken away from the knee requiring that the two parts be wired together.

After the accident, the plaintiff was taken from the scene of the accident to a hospital in Binghamton by ambulance. She was given emergency treatment there and was placed in bed until November 13, a matter of some five or six days before surgery was undertaken. If I recall correctly, the surgery was de-

layed because of the apparent worry about possible infection. The left knee was then repaired by surgical means. The cartillage was removed, torn ligaments were sewn, but not all the ligaments could be repaired. A pin was placed in the plaintiff's right thigh in order to place her right leg in traction so the traction rather than an operation could be used for positioning the bones in her right leg.

Following the surgery, the plaintiff's left leg—when I refer to plaintiff here, I think it is obvious that I am referring to the plaintiff, Helen Kelley. Her left leg was placed in a full-leg cast from the foot to the hip so that just her toes were exposed. This cast was not removed until January 3rd, 1973. That is, it was on from November 11th, a period of from 55, 56 days. Her right leg, in an effort to position the fracture in the femur, was placed in a cradle of sorts with weights attached so that it would be in traction, and traction was applied until February 9th, a period of some 90 or 94 days. After removing the traction, the right leg was still maintained in this suspended position in a cradle, but at this period it was not constantly in that position, but it was taken out for her to go to the physiotherapy department. Earlier she was taken out on a stretcher with the traction still applied.

Physiotherapy was commenced as soon as the cast was removed, and I believe that there were some efforts at exercise, either passive or active, before that time. As a result of one leg being in traction and the other leg being in this full-length cast, the joints

had stiffened and the muscles, of course, had naturally deteriorated. She remained in the hospital undergoing the usual treatment, including physical therapy, until March 24th, 1973 when she was released. Her hospitalization covered a period of about four and a half months.

During the period of hospitalization, the plaintiff suffered considerable pain. She was administered Demerol and other pain-relieving medications as well as tranquilizers such as Valium. She had pains in her back as a result of being required to maintain a position of practically complete immobility in her back for a long period during the period the traction was applied and the leg cast was on. Towards the end of her hospitalization, she suffered a period of anxiety and depression, although throughout most of her hospitalization, she demonstrated great courage and determination to effect a recovery and a resumption of normal activities as far as could possibly be achieved. For the latter part of her hospitalization, she was instructed in the use of a walker. She used a walker, she used a wheelchair, and subsequently, crutches over a long period of time. She graduated from the wheelchair to the walker to the crutches, to one crutch, to no aid. Her physical therapy was continued until December 1973 and her checkups by the attending physician continued for another year. Her exercise program has continued to date. Her efforts have been conscientious in connection with exercise. A failure to exercise would, I am sure, result in a deterioration of her condition. She scrupu-

lously adheres to a regimen of exercise to maintain her limbs as good condition as is possible. In fact, I think that counsel all made reference to the fine recovery that this plaintiff effected and were quite extravagant in their praise of her determination and courage in connection with her recovery.

There was no medical evidence offered to dispute that offered by the plaintiff. As a result of the accident, she suffered permanent injuries to her right leg. Her right leg is one-half to three-quarters of an inch shorter than it was. Her right thigh muscles have atrophy to some extent. Her right thigh is now one-half inch less in circumference than her left thigh. She has a small degree of rotation, deformity in the right thigh, and she has lost some flexion in the right knee. Her left knee, of course, suffered the most severe injury. A ligament was ruptured, not repaired, and the ligament that was involved was the ligament that stabilizes the knee. She now must rely on other ligaments and muscles to perform this stabilizing function instead of the ligaments supplied by nature for this purpose. As a result, there is increased instability in the knee, and she has difficulty with that knee. The range of motion is limited. She is now suffering from traumatic arthritis in both knees which, of course, is permanent and will worsen with time and age. She has a grating sensation with the use of her left knee.

John Kelley, the plaintiff, Helen Kelley's husband, incurred reasonable medical expenses in connection with the care and treatment of his wife's injuries in

the total amount of $11,680.75. During his wife's hospitalization, he visited her on a daily basis. Since his wife prepared the meals normally, he was obliged to take his meals, particularly his dinner, out every evening until her return to the family home. The companionship, of course, society of his wife, the inability to engage in their normal activities that they previously enjoyed as husband and wife, were denied them. The plaintiff, John Kelley, was obliged to drive his wife to and from the therapy sessions for several months at her return home. In short, during the period of his wife's hospitalization, he was wholly, and during the subsequent period of home convalescence and rehabilitation, he was partially deprived of his wife's services, society and marital relationship that they enjoyed prior to the accident.

I find that the plaintiff, Helen Kelley, suffered damages in the total amount of $50,000. I find that the plaintiff, John Kelley, sustained damages in the total amount of $15,000.

I conclude that this Court has jurisdiction of the parties and the subject matter of this action, that the plaintiffs have complied with all jurisdictional requisites to a suit under the Federal Tort Claims Act except as to the filing of a timely administrative claim. This, however, does not make the claim of the plaintiff dismissible pursuant to the decision of Honorable Lloyd MacMahon in this action dated September 18th, 1975. In fact, in my mind, it raises an inquiry as to whether if the claim, by reason of what Judge MacMahon referred to as "the government's

inexcusable delay, not sharp practice" was in fact dismissible if it couldn't and perhaps shouldn't have been, if that were the case, remanded to the state court for prosecution as it had originally been commenced. It is a question that is not before me at this time, and I don't think it can arise at this time.

I further conclude that Francis Hunt, the government employee was acting within the scope of his employment with the United States at the time of the accident involved, that he negligently operated his motor vehicle at the time in question, in that he operated his vehicle so that at least part of it was to the left of the center line of the highway, and under all the conditions existing at the time, was driving at a speed in excess of that reasonably prudent.

The defendant, Ruth Semko, likewise negligently operated her motor vehicle at the time in question for the same reasons assigned to Francis Hunt.

I find that neither the Plaintiff Helen D. Kelley or the Plaintiff John E. Kelley were negligent in any manner whatsoever or were guilty of contributory negligence. The accident, with the resulting injuries, were proximately caused by the negligence of both defendants. Each defendant contributed to their respective negligence equally to the accident.

Judgment should be entered in favor of each plaintiff against both the Defendant United States of America and the Defendant Ruth Semko, apportioning liability as between them in accordance herewith, the judgment in favor of the plaintiff to be entered against both; the formal judgment to be on consent

were settled before me on three day's notice at Auburn, New York.

Now, if I accidentally, or through error, made any findings here for which there is no support in the record, you may call it to my attention.

MR. KRAMER: Your Honor, I have just one thing. I think in referring to the injury to Mrs. Kelley's leg, you referred to the muscles in the right leg as having atrophied, and I think Dr. Blauvelt's testimony was that it was the muscles in the left leg above the knee which had showed the signs of atrophy.

THE COURT: Well, if I did that, the record may stand corrected.

MR. KRAMER: Thank you.

THE COURT: Sometimes it is difficult not to confuse left and right and north and south.

MR. KRAMER: I do it every day.

THE COURT: Well, I am talking off the top of my head from sparse notes.

MR. SOMMER: Your Honor, I suspect there is only one area. I think you indicated that the road approaching from the north is substantially level and straight, and I am wondering if the testimony didn't reflect that with respect to the road approaching from the south.

THE COURT: Hunt was going up the hill. Semko was approaching the crest of the hill to decline. Hunt was ascending.

MR. SOMMER: All right.

THE COURT: Semko came off the level to go down. Hunt came up the hill to reach the level. I got that picture in my mind right.

All right, gentlemen. Entry on a judgment or I will sign it.

All exhibits may be returned to the parties supplying them with the understanding that they will be produced if needed for any other proceeding in connection with this case.

* * * * *

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 75-CV-62

HELEN D. KELLEY AND JOHN E. KELLEY, PLAINTIFFS

vs.

UNITED STATES OF AMERICA AND RUTH SEMKO,
DEFENDANTS

JUDGMENT

This action came on for trial before the Hon. Edmund Port, District Judge, Presiding, and the issues having been duly tried and a decision having been duly rendered in favor of the plaintiffs upon the causes of action alleged in the complaint against the defendants, in the sum of $65,000.00, with interest the date hereof, and having further rendered a decision apportioning the damages among the defendants in the following manner:

Defendant, United States of America	50%
Defendant, Ruth Semko	50%;

and the costs, having been duly taxed at $225.62.

NOW, on motion of Kramer, Wales & McAvoy, attorneys for the plaintiffs, it is

ORDERED AND ADJUDGED that the plaintiff, Helen D. Kelley, recover from the defendants the sum

of Fifty Thousand Dollars ($50,000.00), and the plaintiff, John E. Kelley, recover from the defendants the sum of Fifteen Thousand Dollars ($15,000.00) with interest in each case at the rate of % as provided by law from the date hereof, together with the costs of this action, and it is further

ORDERED AND ADJUDGED that the defendants, and each of them, shall be entitled to a judgment against the other upon payment to the plaintiffs, upon the judgment, of such amount as shall exceed such defendant's proportional share of the judgment in favor of the plaintiffs, and that such defendant shall be entitled to execution for such excess so paid.

Dated and entered Utica, New York
JULY 1976

Clerk of the Court

APPENDIX F

STATUTORY PROVISIONS INVOLVED

28 U.S.C. 1346(b) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. 2401(b) provides:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

28 U.S.C. 2675(a) provides:

> An action shall not be instituted upon a claim against the United States for money damages for

injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

28 U.S.C. 2679 provides in pertinent part:

* * * * *

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his

estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

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